ONG TEIK SENG v. HO SWEE CHEE

[O.C.J. (Mustapha Hussain J.) March 5, 1987]

[Alor Setar – Civil Suit No. 278 of 1979]

Damages – Quantum – Leg and spine injuries.

Road Traffic – Car colliding into plaintiff who was pushing bicycle along edge of road – Liability apportioned 80:20.

The defendant's car, on June 18, 1977, collided into the plaintiff while the plaintiff was pushing his bicycle along the edge of a certain road. As a result the plaintiff suffered the following injuries: (a) fracture of the right tibia and fibula, (b) fracture of thoracic vertebrae 11 and 12 and 1st lumbar vertebrae, (c) ½" shortening of his right leg resulting in a limping gait and compensatory twisting of the spine with probability of back pain in later years, (d) weak right leg and inability to stand for long.

The plaintiff was 37 years old at the time of accident and was self-employed as a carpenter earning before the accident $18 per day.

Held: (1) the plaintiff himself had contributed to the collision. He should not have pushed his bicycle which was without the rear red reflector, if indeed he was really pushing and not riding it. The plaintiff must have been at the edge of the road. On the other hand, the defendant should have been more alert and driven at a much lower speed when passing through the small towns and should have been on the keen look-out for people riding bicycles without lights and even those riding motor cycles without lights and carrying more than one passenger on the pillion;

(2) liability should therefore be apportioned at 80% on the defendant and at 20% on the plaintiff;

(3) damages were assessed as follows:

(a) General damages for pain and suffering and loss of amenities *i.e.* for the fracture of the right tibia and fibula, fracture of the ribs and ½" shortening of the right leg $20,000.00

(b) Special damages (agreed) ... ... $ 435.00

(c) Loss of earnings: Post-trial $38,400.00

Pre-trial $16,260.00

(d) Damages awarded was reduced by 20% accordingly.

[*Editorial Note:* The defendant's appeal against the decision of the court in this case was allowed to the extent that the award for future loss of earnings be substituted by an award for loss of earning capacity in sum of $10,000.00 on the basis of 100% liability. Half of costs of appeal to appellant. Deposit to appellant.]

CIVIL SUIT.

Baldev Singh Bhar for the plaintiff.

Louis Edward Van Buerle for the defendant.

Cur. Adv. Vult.

Mustapha Hussain J.: This is a claim by the plaintiff for damages arising out of a motor accident which happened on June 18, 1977, at about 9 o'clock at night at about the 6½ milestone Alor Setar to Sungei Petani main road.

Simpang Ampat Kangkong is a small town about 6½ miles outside Alor Setar towards Sungei Petani. There was a Chinese wayang going on there that night when the plaintiff met with the accident.

The plaintiff had come out of his house in Jalan Tokai (which is the side road towards the east running through the Alor Setar to Sungei Petani main road to the west which is known as Jalan Kangkong). The plaintiff was riding a bicycle with a light in front and a red reflector at the rear. On reaching the junction of the main road, at Simpang Ampat town, the plaintiff pushed his bicycle across to the west side of the main road and then pushed it along the side of the road towards north, as the Chinese wayang was about 3 or 4 telegraph poles away from the junction. The plaintiff said he was pushing his bicycle about 1½ feet from the edge of the road, as there was a "cycling prohibition" sign on the side-table. Counsel for plaintiff had at this stage applied to amend paragraph 3 of the statement of claim by substituting the word "riding" by the word "pushing," to which counsel for defendant had no objection. This is obvious because there was a "no cycling" sign and indeed the plaintiff was led in his evidence by his counsel when counsel asked why was he pushing and not riding the bicycle to which the plaintiff had replied that there was a road sign prohibiting cycling. And the plaintiff quite smartly added that there was no sign prohibiting pushing a bicycle. Any way, the plaintiff said he was pushing his bicycle 1½ ft. away from the edge of the road when suddenly he closed his eyes and became unconscious and he was knocked down. He woke up at the General Hospital, Alor Setar. The place he was knocked down was about one or two telegraph poles away from where the Chinese wayang was going on which was on the east side of the main road. The plaintiff sustained injuries and his bicycle had the following damages:-

(i) rear mudguard and rear wheel pushed towards the front;

(ii) seat and carrier damaged;

(iii) a foot pedal bent; and

(iv) front lamp broken.

In cross-examination by counsel for defendant, the plaintiff when asked that since the Chinese wayang was on the east side of the main road and his house too was on the east side, why had he to cross the junction instead of pushing his bicycle

along the east side, quite cleverly replied that it was against the flow of traffic even though on the east side there was a side table. Under further cross-examination by counsel for defendant it was put to the plaintiff that he was in fact cycling on the tar road and not pushing the bicycle 1½ ft. away along the side table, which the plaintiff denied.

A J.K.R. driver Muthiah gave evidence on behalf of the plaintiff. This Muthiah went one step further than the plaintiff. He said the plaintiff was pushing his bicycle about 3 ft. from the edge of the road (the plaintiff had said he was pushing 1½ ft. away from the edge) when defendant's car, coming from Sungei Petani, went on the side table and knocked into the plaintiff's bicycle from the rear. This witness also said that the road was dry, not wet. (See Agreed Statement of Facts which said the road was wet due to a shower earlier).

The defendant in her defence said she was driving her car from Butterworth towards Alor Setar, with another girl sitting next to her. As she neared the place where the accident happened, she saw the plaintiff cycling on the laterite road on the side table. Then the plaintiff rode onto the tar road and she applied her brake but her car collided into the plaintiff. The left bumper of her car knocked into the plaintiff's bicycle at the rear. She said that the plaintiff's bicycle had no reflector. She also said that the road was wet. At the point of impact her car was about 1½ ft. to 2 ft. away from the edge of the road, still on the tar road. There was a lamp post at the scene of accident but there was no lamp on it and the place was quite dark.

In cross-examination, the defendant said the first time she saw the plaintiff, he was about 10 feet away and the cyclist was 1½ feet on the tar road.

The defendant's passenger friend in the car at the time of accident Miss Lim Guat Leng, also gave evidence saying that the plaintiff's bicycle did not have a rear reflector and that the plaintiff had come out of the laterite part of the road on the side table onto the tar road.

The defendant's police report (page 2 of bundle 'A') tallies with her evidence in court, whereas the plaintiff's police report (page 4 of bundle 'A') does not say whether the plaintiff was pushing or riding his bicycle. The plaintiff had only said "when I reached at the end of the road near the bridge, a motor car which came from the direction of Butterworth had knocked into me."

There are these two versions of the accident, the plaintiff saying that while he was pushing his bicycle 1½ feet from the edge of the road, he was knocked down from behind, and the defendant on the other hand saying that the plaintiff rode the bicycle from the side table and went onto the tar surface of the road for about 1½ ft. or so, and was without light and rear reflector. In a situation like this, the Court must look for aid from the silent witness, *i.e.* the police reports and the sketch plan, together with the condition of the road, side table and the traffic signs.

It is common ground that the road surface was wet due to an earlier shower. The plaintiff probably was pushing his bicycle with the bicycle on the tar road itself and right on the edge. The laterite side table was wet and if one has a choice of walking on a hard tar road than walking on a wet laterite path, one would rather walk on the hard tar road.

Had the defendant's car gone onto the wet laterite road the impact on the plaintiff would have thrown the plaintiff and his bicycle into the big drain next to the laterite side table because the car would have to go at an angle onto the side table. As it were, the blood patch, the slippers and the bicycle were found on the side table itself. This clearly indicates that the impact was somewhere near the edge of the road. The road was straight and there was no earthly reason why the car should go out of its way onto the side table.

The plaintiff himself had contributed to the collision. He should not have pushed his bicycle which was without the rear red reflector, if indeed he was really pushing and not riding it. The plaintiff must have been at the edge of the road. He could have easily seen the lights of the car approaching from rear.

On the other hand, the defendant should have been more alert and driven at a much lower speed when passing through the small towns and should have been on the keen look-out for people riding bicycles without lights and even those riding motor cycles without lights and carrying more than one passenger on the pillion.

Considering all the evidence including the silent witnesses, the Court apportioned liability at 80% on the defendant and at 20% on the plaintiff. In the circumstances of this case, a finding of higher percentage of contributory liability on the part of the plaintiff for the accident would not have been wrong, a point which the Supreme Court may wish to look into.

On the Quantum of Damages

The plaintiff suffered injuries as listed on page 8 of 'A' which are:

(1) fracture of the right tibia and fibula; &

(2) fracture of the thoracic vertebrae 11 and 12 and 1st lumbar vertebrae.

The plaintiff was hospitalised for about 32 days and his permanent disabilities are:

(1) 1/2" shortening of his right leg resulting in a limping gait and compensatory twisting of the spine with probability of back pain in later years; &

(2) weak right leg and inability to stand for long.

(See pages 8 to 15 of bundle 'A' for further medical reports).

The plaintiff was 37 years old at the time of accident on June 18, 1977, and was self-employed as a carpenter, earning, before the accident, $18/- per day and said he worked 26 to 27 days a month. Taking into consideration that a self-employed carpenter could only get work when and if there is a need, 20 days a month would be a fair figure. An earning of $18/- per day is not unreasonable.

After the accident, the plaintiff could only resume work in January 1979 – a lay off of 370 days (June 18, 1977, to December 31, 1978) and when he started to work, because of his disabilities, he could only earn $14/- per day. The plaintiff had called a fellow carpenter to testify that he earned $30/- to $35/- per day. This rate for carpenters is quite reasonable especially during the housing boom years, after all an unskilled labourer earns about $15/- per day and a carpenter is a skilled artisan. Taking the lower figure of $30/- per day, as the earning of his fellow carpenter, the plaintiff would have been earning this sum of $30/- per day had he not been injured in the accident.

Basing on 100% liability, the awards of damages in this case would be:

(1) *General damages for pain and suffering and loss of amenities, i.e.* for the fracture of the right tibia and fibula, fracture of the ribs and 1/2" shortening of right leg, a sum of $20,000.00

(2) *Special damages, as agreed* – $435.00

(3) *Loss of earnings (pre-trial)*

(a) Actual loss from June 19, 1977 to December 31, 1978 a period of 370 days, calculated on the basis of 20 days work in a month, at $18/- per day = $18 x 370 =$ 6,660.00

(b) When the plaintiff resumed work from January 1, 1979 to date of trial when he could earn $14/- per day instead of $30/- per day as his fellow carpenter was earning, the plaintiff's average loss would be $30 minus $14 divided by 2 = $8 per day – for 5 years – 20 working days x 12 x 5 years x $8 = $ 9,600.00

Total loss of earnings (pre-trial) .. $16,260.00

(4) *Loss of earnings (Post-trial or future loss)*

The plaintiff would have earned like his fellow carpenter $30/- per day (taking the lower figure). The plaintiff is now 44 years old and could work up to 60 years. He is now earning $14/- per day and the loss is $30 – $14 = $16/- per day or $320/- per month. Taking a period of 10 years this would amount to $320 x 12 x 10 years =$38,400.00

Summary of awards

In view of my finding of 20% liability on the part of the plaintiff, the awards above stated were reduced by 20% and I gave judgment for the plaintiff in the following sums:-

(1) General damages .. $16,000.00
with interest at 8% per annum from date of service of writ to date of trial.

(2) Special damages (as agreed) .. $ 348.00
with interest at 3% per annum from date of accident to date of trial.

(3) Pre-trial loss of earnings .. $13,012.00
with interest at 3% per annum from date of accident to date of trial.

(4) Post-trial (future) loss of earnings (No interest) .. $30,720.00

and

(5) Costs.

Order accordingly.

Solicitors: *Baldev Bhar ; Cheong Wai Meng & Van Buerle.*